IN THE HIGH COURT OF HIMACHAL PRADESH, SHIMLA.

F.A.O. No. 20 of 1998.

Judgement reserved on:

Date of decision : May 18, 2006.

Chain Ram …….. Appellant.

Versus

Shamsher Singh & ors. ……. Respondents.

Coram

The Hon'ble Mr. Justice Surjit Singh, Judge.

Whether approved for reporting?

For the appellant: Mr. G.D.Verma, Sr. Advocate with Mr. B.C. Verma, Advocate.

For the respondents: Mr. Ajay Kumar, Advocate, for respondents No. 1 & 2.

Surjit Singh J. (Oral).

Heard and gone through the record. Respondents Shamsher Singh and Gulab Singh, hereinafter called plaintiffs, filed a suit seeking declaration that the property, described in the plaint, was ancestral property of the parties and they (plaintiffs) were entitled to the entire share of one Madan Singh and 1/5th share each of deceased Murtu Devi and that the property was still joint and no partition had taken place.

Whether reporters of local Papers may be allowed to see the judgment?

Defendants contested the suit. They denied the claim of the plaintiffs as regards the extent of their claimed share and also that the property was ancestral and joint. Certain preliminary objections were also raised. A large number of issues were framed by the trial court. Findings on all the material issues were returned against the plaintiffs and consequently the suit was dismissed.

Plaintiffs filed an appeal in the court of Additional District Judge. Learned Additional Judge, has through the impugned judgement, set-aside the judgement and decree of the trial court and remanded the case to the trial court, with a direction to decide the same afresh, after re-recording the findings on certain specified issues, as also some additional issues framed by it. At the same time, the learned Additional District Judge has given his own findings on two issues pertaining to limitation and the plea whether the property stood partitioned or was still joint.

Defendants have come in appeal to this court. Their contention is that the judgement of the first appellate court is contrary to the provision of Order 41, Rules 23 and 25 of the Code of Civil Procedure, as interpreted by this court, vide judgement dated 28th August, 2001, delivered in FAO No. 554 of 2000, titled Durga Dass vs. Mathu.

I have heard the learned counsel for the parties and gone through the record. A reading of the judgement of the first appellate court shows that the case has been remanded for recording fresh findings on certain issues with the observation that all the facts, circumstances and the evidence led by the parties qua those issues, have not been taken into account by the trial court. In my

view, the court of the District Judge, being the court of fact, could have itself recorded the findings on those issues, by taking into account the material and the evidence, which according to it, was not discussed or taken into account by the trial court. Therefore, the order of remand, so far as the recording of fresh findings on some of the already framed and decided issue, is concerned, is bad on the face of it. As regards the additional issues, framed by the first appellate court, the right course was to have directed the trial court to record evidence of the parties qua those issues and to return its finding thereon, in the form of a report and on receipt of such report to afford opportunity to the parties to raise objections, if any, qua such findings and then to hear and decide the appeal finally.

The first appellate court was also not right in determining some of the points finally while at the same time setting aside the judgement and the decree of the trial court and remanding the case for fresh decision after re-recording the findings on some other issues, as also the additional issues framed by it.

As a result of the above stated position, appeal is accepted and the order of the Additional District Judge, remanding the case, is set-aside. Findings recorded by the first appellate court on the issues pertaining to plea of limitation and the plea that the property is joint, are set-aside. Any other observations made by the first appellate court touching the merits, are ordered to be not taken into account either by the trial court while submitting the report on the additional issues or by the first appellate court while deciding the

appeal afresh after the receipt of the report of the trial court on the additional issues.

As a sequel to the setting aside of the order of remand, the appeal filed in the court of Additional District Judge is restored to the file of the learned Additional District Judge. The Additional District Judge shall call for the report of the trial court on the additional issues framed by it and while calling for such report, will direct the trial court to afford due opportunity to the parties to lead evidence on the additional issues framed by it (the first appellate court).

The parties are directed to put in appearance before the Additional District Judge, Shimla on 8th June, 2006.

CMP No 40 of 1998.

Interim order dated 9.1.1998 stands vacated and the application is dismissed.

May 18, 2006. **(Surjit Singh),**
(Hem) **Judge.**